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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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The Petition for Writ of Certiorari Was Timely Filed

Petitioner filed his petition for certiorari on June 19, 1968 within ninety days after the final judgment of the Appellate Term of the Supreme Court of New York[1]

[1] There is no right of appeal to the New York Court of Appeals, though Sections 519 and 520 of the New York Code of Criminal Procedure allow discretionary appeal. Section 520 provides:

* * * * *

> If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had makes a certificate granting permission

(March 22, 1968). On July 11, 1968 petitioner applied for leave to appeal to the Court of Appeals of the State of New York, the highest state tribunal, alleging that the application was in time, since no final order had ever been served on him. The New York Court of Appeals recognized that the state appeal was timely when on July 29, 1968, Judge Kenneth Keating denied leave to appeal certifying that "upon application timely made, . . . and upon the record and proceedings herein," no question which ought to be reviewed by the Court of Appeals was presented.[2] The timely completion of the state appellate process when read alongside decisions of this Court respecting finality conclusively establish the timeliness of the petition for certiorari in this case.

It is settled that a state court judgment, to be final, "must be subject to no further review in any other state tribunal." *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551 (1945). Further,

> "[I]t must be clear that definitive disposition has been made of all the legal and factual issues in the case, not just the important ones or the federal ones. Thus 'the requirement of finality has not been met merely because the major issues in the case have been decided and only a few loose ends remain to be tied up. . . .'

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to appeal and certifying that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

* * * * *

[2] A certified copy of the Order of the Court of Appeals has been filed with the Clerk of this Court.

Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62, 68."[3]

Contrary to respondent's contention, therefore, a petition for certiorari to review the first decision of the Court of Appeals of July 7, 1967, would have been proper only if "the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72 (1946).

The record shows that such finality had not been achieved by the July 7th decision of the New York Court of Appeals. This case had been appealed pursuant to a special procedure under New York law allowing appeal after denial of a Motion to Suppress.[4] The purpose of this procedure, as counsel noted in his affidavit supporting the Motion to Suppress, is "[s]o that the issues of the reception in evidence be properly raised and disposed of before trial, and

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[3] Stern and Gressman, Supreme Court Practice 76 (Third Ed. 1962).

[4] Section 813-c of the New York Code of Criminal Procedure provides:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.
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> * * * * *
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> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

not during or as part thereof" (R. 15). Thus other matters of defense were reserved until the question of tainted evidence was resolved by the New York Court of Appeals. Once that issue was settled, Sec. 543-b of the New York Code of Criminal Procedure required the New York Court of Appeals to remand the matter for determination of the other issues and of the facts.[5] Thus, after decision on the Motion to Suppress, the New York Court of Appeals ordered "the matter remitted to that court [the Appellate Term] for consideration of the other points raised by the defendant which were not decided on the prior appeal."[6]

The Appellate Term on remand, therefore, had before it all the unresolved issues that had been raised in the original Notice of Appeal and Affidavit of Errors to the Appellate Term (R. 231-239). On remand, petitioner filed with the Appellate Term Appellant's Brief on Remand From the Court of Appeals. This brief was not a part of the record in this case but has now been filed with the Clerk of this Court. Petitioner therein at pp. 2 and 4 urged that: "Under the decision of the Court of Appeals, herein, the

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[5] "*§543-b.* The court of appeals, upon reversing or modifying a determination of one of the intermediate appellate courts referred to in section five hundred seventeen, where it appears that the findings of fact in the court of original instance were not affirmed or considered by such intermediate appellate court, or where it must be presumed, as required by section five hundred forty-three-a, that the questions of fact were not considered by such intermediate appellate court, shall not render a determination based upon the findings of fact made in the court of original instance, but shall remit the case to the intermediate appellate court for determination upon the questions of fact raised in that court."

[6] See certified copy of the opinion of the New York Court of Appeals, p. 4. It is clear that no mere ministerial act remained to be done such as would follow a mandate to enter judgment. See *Cole* v. *Violette,* 319 U. S. 581 (1943); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382 (1953).

issues remitted for review and determination by this Court are those matters specified a. through g. . . . both factual and legal":

"a. Insufficiency in law of informations filed against defendant,

b. Suppress and return of evidence illegally obtained, representing contraband and confession,

c. Arrest and detention without probable cause and under simulation of a legal search warrant,

d. Opening of his school locker as being illegal,

e. Search of the coat therein without defendant's consent violating his constitutional rights,

f. Failure on the part of the police to disclose identity of informer,

g. Failure to direct production of school records and permit the same to be used on cross-examination."

These issues were resolved unfavorably to petitioner by the Appellate Term in a confidential opinion now on file with the Clerk of that court. Had that court decided any of them favorably to petitioner, review by this Court would have been unnecessary and therefore foreclosed. With issues outstanding which could have terminated the case in the state courts, this Court, following its usual practice, would not have found the case ripe for Supreme Court review had petitioner sought certiorari following the first decision of the Court of Appeals.[7]

[7] The remand and second appeal were clearly required before certiorari could be sought. Under this Court's decisions, the second appeal is necessary even if the appellate tribunal considers itself

Where an appellate court declines review, the lower court's judgment becomes that of the highest court in which decision could be had. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock*, 279 U. S. 410 (1929); *Virginian R. Co.* v. *Mullens*, 271 U. S. 220 (1946);[8] Stern and Gressman, *supra* at 89. Thus the judgment of the highest court in this case was that of the Appellate Term. However, if there is discretionary review by a higher state court such review must be sought. *Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Matthews* v. *Huwe*, 269 U. S. 262, 265-266 (1925). Although such review was not originally sought herein, petitioner was able to make an effective cure; on July 29, 1968 review was denied on the merits and not dismissed as being out of time. That denial conclusively settles the question of state law raised by respondents (at p. 5) that petitioner's appeal from the Appellate Term was out of time.

Since the denial of leave to appeal by the Court of Appeals is dated July 30, 1968 no question arises as to the timeliness of the petition for certiorari herein. Even if the petition were premature as originally filed, the completion of the appellate process thereafter rendered the petition timely, since the ninety-day time period for filing for certiorari would then run from July 30, 1968, the date of the denial of review.

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bound by its prior decision, rendering the second appeal a mere formality. *McComb* v. *Knox County*, 91 U. S. 1 (1875); *Great Western Teleg. Co.* v. *Burnham*, 162 U. S. 339 (1896).

[8] Thus recently in another New York case, *Ginsberg* v. *New York*, 390 U. S. 629 (1968), the Appeal was noted not from the New York Court of Appeals but from the Appellate Term of the Supreme Court of New York, Second Judicial Department.

CONCLUSION

For the reasons stated above, the petition in this case was timely filed and certiorari should be granted.

Respectfully submitted,

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